Can private undertakings hide behind “religious neutrality”?

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At first glance, matters of religious belief and practice may seem as remote from the everyday concerns of the European Court of Justice as can be. Yet no less than three high-profile cases are currently pending before the Court in which religion is front and centre. The question which the Court needs to answer in each of these proceedings is essentially this: to what extent does EU law require accommodation of religious observance? The first two cases, *Achbita* and *Bougnaoui*, concern the issue of whether the prohibition of discrimination based on religion under the Employment Equality Directive 2000/78 makes it unlawful for a private-sector undertaking to dismiss a Muslim employee because she refuses to remove her veil at work. In the third case, *Liga van Moskeeën*, the Court is asked whether Regulation 1099/2009 on the protection of animals at the time of killing leaves sufficient room for ritual slaughter to be consistent with the freedom of religion as enshrined in Article 10 of the Charter and Article 9 of the ECHR.

It is no coincidence that all three proceedings originated in Belgium and France. Both States have a sizeable and growing Muslim community that demands respect for its religious practices. Yet both States take a singular, stringent approach to the religious diversity of their inhabitants, which is often labelled “religious neutrality”, “secularism” or (in France) “laïcité”. In the Franco-Belgian tradition, State neutrality to religion implies, amongst other things, that religion must have no influence on State affairs. One of the consequences that flow from this conception of neutrality is that public servants in France and Belgium are prohibited from wearing religious symbols.

Much in the same way as French and Belgian public authorities tend to do, two *private* undertakings now invoke their own “neutrality policy” before the Court of Justice in an attempt to justify the dismissal of employees on the ground that they insist on wearing the Islamic headscarf at work. In *Achbita*, the Belgian case, AG Kokott finds this argument persuasive. In the Advocate’s General view, the enforcement of a corporate policy of religious and ideological neutrality is a legitimate aim, which may justify a general company rule prohibiting visible political, philosophical and religious symbols in the workplace. The Advocate General does accept that the company’s dress code, while applying without distinction to all signs reflecting the employee’s convictions, religious and ideological alike, may nonetheless put female Muslim employees at a particular disadvantage compared with other employees. However, she considers the disparate impact of the facially neutral dress code justified on the basis of the employer’s fundamental freedom to conduct a business, which implies the freedom to determine and pursue a corporate identity or image, including an image of neutrality. For a company such as that in issue, which provides surveillance, security and reception services to other undertakings, an image of neutrality is said to be “absolutely crucial”, because of the variety of the company’s customers and the nature of the work performed by its employees, which entails constant face-to-face contact with external individuals (§ 94).

The French *Bougnaoui* case bears significant similarities to that of Ms. Achbita. However, AG Sharpston, who delivered the Opinion, reaches a radically different conclusion than does her colleague in *Achbita*. At issue in *Bougnaoui* is a rule adopted by a business consultancy firm which prohibits employees from wearing religious signs or apparel when in contact with customers. AG Sharpston classifies the company’s dress code as directly discriminatory on grounds of religion. Yet the Advocate General also considers the hypothesis that the Court disagrees on this point, subjecting the dress code to an additional review through the lens of indirect discrimination. Like AG Kokott, AG Sharpston recognises that the business interests of the employer, in particular his interest in communicating a certain image of the company, constitute a legitimate aim that may justify the adoption of a corresponding dress code (§§ 115-116). However, unlike her colleague in *Achbita*, AG Sharpston does not explicitly accept that an image of *(religious) neutrality* is amongst the images a company such as that in issue may legitimately wish to project to its customers. Moreover, she indicates that, in her view, the prohibition on wearing religious attire that was imposed on Ms. Bougnaoui is not proportionate to its objective.

The question of whether the pursuit of religious neutrality is an acceptable aim for public and private organisations alike, on the basis of which they may prohibit their employees from wearing religious signs or apparel whilst at work, is an important but complex one. It should therefore not surprise that the Advocates General seem to arrive at opposite conclusions on this point or, to put it perhaps more accurately in the case of AG Sharpston, prefer to remain silent on the subject. To solve this puzzle, I think it is crucial to see that there are two radically different reasons why a private-sector company may wish to adopt an identity of religious neutrality, which reflect two distinct types of *interest* a company may have in religious neutrality: a business interest and an interest as a member of society.

First, it is stating the obvious to say that private undertakings have individual business interests. The freedom to conduct a business is enshrined in Article 16 of the Charter and can, therefore, be relied on by an employer to justify a limitation of the rights of others, most notably his employees. As noted by the Advocates General in both *Achbita* (§§ 81-82) and *Bougnaoui* (§§ 115-116), that freedom can reasonably be interpreted as implying the liberty to project a certain corporate image and to determine a corresponding dress code for staff (see also ECtHR, *Eweida a.o. v. the UK*, § 94). So, an employer could very well ask his employees to dress smartly, or casually, when meeting with customers, because that style contributes to the particular corporate image he wants to communicate. But is it also permissible for a private undertaking to choose a *religiously neutral* look, and to require its personnel to dress accordingly?

The answer is probably “yes” for private organisations with an explicit non-confessional ethos, such as certain associations, schools or hospitals. Religious neutrality can be considered an essential aspect of the identity of such organisations, which in principle justifies restrictions on the wearing of religious signs by their members or personnel. However, the adoption of a religiously neutral look is far more controversial for companies which cannot honestly claim to be driven by non-confessional beliefs. Nevertheless, AG Kokott readily accepts that such a look is “absolutely crucial” for a company that offers surveillance, security and receptions services. She cites two reasons for this proposition: the variety of the company’s customers, and the constant face-to-face contact between its employees and other persons. Yet if these are relevant criteria, then a whole range of private undertakings would be justified in adopting a policy of “religious neutrality”. What about restaurants, bars, hotels, shops or gyms, for example? And what if not only the company’s staff, but also its customers are visible to external individuals, so that the customers, too, may influence the corporate image being projected? Can, for instance, a barkeeper ask a Muslim woman sitting on his terrace to remove her veil or leave, for the sake of preserving the bar’s image of neutrality? This is not an imaginary example. Several such cases have been reported in Belgium and France. The Advocate’s General Opinion in *Achbita* does not give us any principled reason why considerations of religious neutrality would be off-limits to the bartender.

Of course, one may object that, what the employers in *Achbita* and *Bougnaoui* are ultimately concerned about is not so much the religiously neutral image, or identity, of their company, but rather the profits and perhaps even the survival of their business. If a company gets turned down by (potential) clients because they prefer not to be served by a person wearing religious symbols, it is simply in the company’s economic interest to fire employees who insist on manifesting their religious convictions. This is a fair point. However, as AG Poiares Maduro emphasised in *Feryn* (§ 18), remedying that negative side-effect of the free market is exactly what anti-discrimination law is all about. Regulation outlawing discrimination is essential to free private undertakings from the discriminatory whims of their customers. Consequently, it would undermine the very purpose of anti-discrimination law if employers were permitted to invoke customer pressure pushing them towards discrimination as a ground of justification.

Let us finally turn to the second type of reason why a private undertaking may prefer an identity of religious neutrality, which is not relied on in the proceedings before the ECJ, but which may nonetheless be implicitly at play. This second reason does not stem from a company’s interests as a business *per se*, but from its interests as a member of society. Like any other member, companies have an interest in operating in a society that flourishes. Let us assume, for the sake of argument that, within a certain society, it is the common view that society must be secular in order to thrive, and that this implies that religious symbols have little or no place in the public space. In that case, it would be in the interest of its individual members that society is secular so understood. Seen from this perspective, undertakings established in countries with a secular tradition, such as

France and Belgium, may have an individual interest in their society being secular in character, which gives them a reason to help their society develop in the desired direction.

Yet even so, it may be doubted that this interest, in and of itself, is sufficient ground for restricting other individuals' personal autonomy in matters so fundamental to them. As Joseph Raz explains in *The Morality of Freedom*, the interest an individual has in living in a society that has certain general qualities is an interest in a *collective* good, and a single individual's interest in a collective good is insufficient justification for imposing duties on others. While it may thus be in the interest of private companies vested in Belgium or France, such as those at issue in *Achbita* and *Bougnaoui*, that their society shall be secular, the interest of a single company is, as such, not enough to impose a *duty* on anyone to make Belgian or French society secular. This implies that it is not within an individual company's power to restrict another individual's fundamental rights, including the freedom of religion and the right not to be discriminated against, for the sake of the collective good of a secular society. At best, the Belgian and French *State* have a duty to realise this good. Yet, as Raz reminds us, such a duty would not be grounded in the interest of a single individual, but in the interests of *all* members of society.

Even though it often remains unarticulated, the idea that a private person cannot be permitted to restrict other individuals' personal autonomy for the sake of achieving a collective good also seems to underpin certain court decisions. So, for decades, the US Supreme Court has accepted the constitutionality of affirmative action schemes adopted by universities on the ground that *educational* benefits flow from a diverse student body. In contrast, the purpose of helping certain groups whom the university perceives as victims of "societal discrimination" has traditionally been rejected as a ground of justification (e.g. *Bakke* (Powell, J.); *Grutter*; *Fisher I*). In a similar vein, it is considered unlawful for employers in the US to oblige their workers to speak English with a view to promoting the national language. The pursuit of a public policy objective like this is regarded as insufficiently related to the operation of a business and cannot therefore be successfully relied upon by an employer (e.g. *Gutierrez v. Municipal Ct.*).

It may be concluded that the *Achbita* and *Bougnaoui* cases raise a complex legal issue, in an area of great sensitivity: is "religious neutrality" an aim upon which private undertakings can legitimately rely to justify a prohibition on the wearing of religious symbols at work? At least as far as these two cases are concerned, it may be doubted. On the one hand, the companies at issue, which provide reception and consultancy services, respectively, do not seem to have a genuine business interest in religious neutrality. On the other hand, their individual interest in the collective good of a secular society, even if sincere, is not sufficient ground for a duty on the part of their personnel to remove religious symbols.

SUGGESTED CITATION Cloots, Elke: *Can private undertakings hide behind "religious neutrality"?, VerfBlog,* 2016/10/06, http://verfassungsblog.de/can-private-undertakings-hide-behind-religious-neutrality/.